

TECHNICAL UPDATE

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The key amendments introduced in statutes, policies and procedures in respect of Direct Tax, Indirect Tax, Corporate Laws & Accounting Standards, Foreign Exchange Management Act / Export Import Policy & Securities and Exchange Board of India related matters are summarized hereunder

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DIRECT TAX

1. Different Project Sites Not To be Aggregated for PE Duration Test

The assessee, a foreign company was a tax resident of Mauritius and engaged in the business of marine and general engineering & construction. During the relevant year, the assessee executed three contracts in India. Though, the duration of each of such contract was less than 9 months, it was aggregating to more than 9 months on a cumulative basis. The assessee contended that since the duration of each project was less than nine months, it did not constitute a PE in India for each such contract and therefore profits derived from execution of those projects were not taxable in India. The assessing officer however contended that the duration of all such projects has to be aggregated for the purpose of determining the PE status. On appeal, the Income Tax Appellate Tribunal ('ITAT') observed that for the purpose of determining PE, the activities in respect of a particular project are to be considered. The ITAT further observed that contract period may be aggregated if such projects are so interdependent and interlinked

that they are to be seen as a coherent whole. However, in the instant case, there was no finding that the projects were interlinked and therefore no PE exists.

Source ADIT vs Valentine Maritime (Mauritius) Ltd (ITA No. 1532/Mum/05, ITAT, Mumbai)

2. Non Resident Payments Chargeable to Tax to Attract Tax Withholding

The assessee imported sophisticated equipment from an overseas supplier and also paid certain sum towards installation assistance and initial training. The assessee was of the view that said sum payments were auxiliary and inextricably linked to the sale of original equipment and hence not taxable in India. Therefore it had no liability to withhold tax on such payments. However, the revenue department contended that per provisions of section 195(2), the assessee had no discretion to decide on tax withholding and in absence of any order under section 195(2)/197, the assessee was obligated to withhold tax on the entire amount of remittance. The ITAT observed that the liability to deduct tax arises only when the sum is chargeable to tax. The assessee is required to approach the tax officer under section 195(2) for determination of appropriate taxability of a payment only when such payment is chargeable to tax either fully or partly. The ITAT, therefore held that since in the instant case the payment was not chargeable to tax, the assessee had no liability to withhold tax on the same.

Source ITO vs Prasad Production Ltd. (ITA No. 663/Mds/2003, ITAT, Chennai)

3. Tax Planning Within the Purview of Law is Legitimate

The Punjab & Haryana High Court relying upon the landmark judgment of the apex court in the case of Azadi Bachao Andolan (263 ITR 706) has held that once a transaction is genuine, merely because it has been entered into with a motive to avoid tax, it would not become a colourable devise and consequently earn any disqualification. The revenue department relied upon the judgment of the apex court in the case of McDowell & Co. vs CTO (154 ITR 148) and contended that the transactions, the purpose of which is tax planning would constitute

colourable devise, liable to be disregarded. However, the High Court held that the judgment in the case of McDowell & Co. vs CTO has been explained in detail by the apex court in the case of Azadi Bachao Andolan and therefore the principles laid down by the apex court in the later case are authoritative and binding.

Source Porrits & Spencer (Asia) Ltd vs CIT (ITA No. 10 of 2004, Punjab & Haryana High Court)

INDIRECT TAX

1. Amendment in Delhi Value Added Tax Rules, 2005 – input tax credits

A new Rule 6A has been inserted to provide for carrying forward of input tax credit on the closing stock to the next tax period or the following tax period or periods till such time as the goods are sold. In respect of credit notes, rebates, remission in prices or incentives, the tax credit on such goods will be proportionately reduced if the goods are sold at a price lower than the purchase price. This will, however, not apply in cases where in the ordinary course of business the goods are sold by a dealer at a loss.

Source: Delhi VAT Notification No. F.3-(23) - Fin (T & E)- 2009-10- Jsin-287, dated April 01, 2010

2. Amendment to Haryana Value Added Tax(HVAT)- Levy of additional tax

An additional tax of 5%, in the nature of surcharge, shall be levied and collected on the taxable turnover of a registered dealer. However, the aggregate of tax and surcharge so payable shall not exceed the rate fixed in case of goods of special importance defined in the Central Sales Tax Act.

Source: Haryana VAT Notification No. Leg-3-2010, dated April 2, 2010

FEMA

1. Buyback / Prepayment of FCCBs

Reserve Bank of India ('RBI') has discontinued the scheme of Buy Back of Foreign Currency Convertible

Bonds ('FCCB') by Indian companies under the automatic route and approval route with effect from January 1, 2010. However applications under the approval route would be consider for buy back of FCCBs until June 30, 2010.

Source: RBI/2009-10/367A.P. (DIR Series) Circular No.44 dated March 29, 2010

2. Overseas Investments - Liberalization

RBI has allowed the participation of Indian companies, investing in overseas unincorporated entities in oil sector up to 400 per cent of their net worth, in a consortium with other international operators to construct and maintain submarine cable system on co-ownership basis under the automatic route.

Source: RBI/2009-10/376 A.P. (DIR Series) Circular No.45 dated April 01, 2010

3. Investment Portfolio of PDs – Amended

RBI has permitted the Primary Dealers ('PDs') to hold the Government Securities in the Held to Maturity category to the extant of their audited net owned funds as at the end March of the preceding financial year.

Source: RBI/2009-10/394 IDMD. PDRD.No.4537/03.64.00/2009-10 dated April 12, 2010

4. Maintenance of Collateral by FIIs for transactions in the cash segment

RBI has permitted Foreign Institutional Investors ('FIIs') to offer domestic Government Securities including with the foreign sovereign securities with AAA rating, as collateral to the recognized Stock Exchanges in India, in addition to cash, for their transactions in the cash segment of the market.

Source: RBI/2009-2010/393 A.P (DIR Series) Circular No.47, dated April 12, 2010

5. The Securitization Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 – Amendments

RBI has amend the Securitization Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 regarding

acquisition of financial assets by trusts floated by Securitization Companies or Reconstruction Companies, extension in time frame allowed for realization of financial assets, deployment of surplus funds, acquisition of land and buildings by Securitization Company or Reconstruction Company; asset classification, additional disclosures in the balance sheet etc.

Source: RBI/2009-10/413 DNBC (PD) CC.No. 18/SCRC/26.03.001/2009-10 dated April 21, 2010

6. Issue and Pricing of Shares by Private Sector Banks

RBI has revised the guidelines in respect of issue and pricing of shares by private sector banks to incorporate the Qualified Institutional Placements ('QIP') mode. The revision includes the Initial Public Offer, Right Issue, Bonus Issue, Preferential Issue and QIP issue. RBI further intimated that in cases where RBI's approval is not required Security Exchange Board of India guidelines would be applicable and in case the same is required both the approval is required.

Source: RBI/2009-2010/411 DBOD No. PSBD. BC 92/16.13.100/2009-10 dated April 20, 2010

7. Guidelines on Change in or Take-Over of the Management of the Business of the Borrower by Securitization Companies and Reconstruction Companies (Reserve Bank) Guidelines, 2010

RBI has issued the Guidelines on Change in or Take-Over of the Management of the Business of the Borrower by Securitization Companies and Reconstruction Companies (Reserve Bank) Guidelines, 2010 to provide the proper management of the business of borrower to enable the Securitization or Reconstruction Company to realize their dues from the borrower.

Source: RBI/2009-10/418 DNBS/PD (SC/RC) No. 17/26.03.001/2009-10 dated April 21, 2010.

8. Investment in Unlisted Non-SLR Securities

RBI has decided that investment in non-SLR debt securities (both primary and secondary market) by banks where the security is proposed to be listed on the Exchange(s) would be considered as investment

in listed security at the time of making investment. However, if such security is not listed within the period specified, the same would be reckoned as the unlisted non-SLR securities.

Source: RBI/2009-10/423 DBOD. No. BPBC98/21.04.141/2009-10 dated April 23, 2010

9. Classification of investments by banks in Bonds issued by Companies engaged in Infrastructure activities

RBI has decided that investment by scheduled

commercial banks in the long-term bonds issued of companies engaged in executing infrastructure projects and having a minimum residual maturity of seven years may be classified under Held to Maturity category.

Source: RBI/2009-10/422 DBOD. No. BPBC97/21.04.141/2009-10 dated April 23, 2010

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